Software & Information Industry Association
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April 20, 2004

Mr. Donald S. Clark, Secretary
Federal Trade Commission
Room 159-H, 600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: CAN-SPAM Act Rulemaking, Project No. R411008 – Mandatory and Discretionary Rulemaking

Dear Mr. Clark:

On behalf of the members of the Software & Information Industry Association (SIIA), we are pleased to offer our comments in response to the request for information by the Federal Trade Commission (FTC) on the CAN-SPAM Act's mandatory rulemaking as well as the discretionary authority for the FTC to issue other regulations.

As the principal trade association of the software code and information content industry, the more than 600 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world as well as many smaller and newer companies.

Our members will benefit from the effective and consistent enforcement of the CAN-SPAM Act. As leaders in our industry, our members have an interest in combating fraudulent, deceptive and unwanted email communications. As indicated in our comments below, it is our view that such enforcement, at this early stage of implementation of the CAN-SPAM Act, will benefit from some clarifications through rulemaking, which will also avoid micromanaging the email communications that our members depend on to offer, develop and maintain products and services to a wide variety of customers, including both consumer and businesses.

Please note that this letter supplements our comments on a proposed "Do Not Email List" submitted on March 31st.[1]

[1] Posted on our website at http://www.siia.net/govt/priv_letter_033104.pdf.

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Mandatory Rulemaking:
Determining "Primary Purpose"

We are very aware of the important role that the definition of "primary purpose" plays in the effective enforcement of the CAN-SPAM Act, its potential for adversely affecting legitimate communications, and the possible criteria provided by the FTC in its request for information. As the FTC is well aware, the inclusion of the "primary purpose" test was an essential element contributing to the legislation's passage, since it was included to avoid roping many legitimate emails into the scope, requirements and prohibitions of the Act.

In our view, we would recommend that the FTC, in its subsequent notice of proposed rulemaking, put forward a "net impression" standard referenced in the Advanced Notice of Proposed Rulemaking (ANPR). This standard has been used in other contexts, some of which may be quite relevant to the implementation of the CAN-SPAM Act, to assess the meaning of an advertisement and the adequacy of disclosures so that the material as a whole can be judged as to its "net impression" on the reasonable observer.

The "net impression" appears likely to be the most workable because the FTC has utilized it in other contexts, and because the other possible criteria present substantial problems. As the FTC itself suggests in the request for information, the "more important" standard leaves unanswered questions that will lead to enforcement uncertainties and may expose legitimate businesses to scrutiny based on subjective judgements. Similar concerns surround the "more than incidental" standard, which does not provide a means for determining the primary *purpose* of the email and, in fact, could very well be inconsistent with the legal test embodied in primary purpose.

The FTC also put forward the possibility of determining primary purpose on whether the commercial aspects of the email financially support the other aspects of the email, and uses the example of a newsletter that provides non-commercial content with the paid advertising or promotions. We strongly urge the FTC to avoid use of any such criteria. At best, these criteria go to the character of the sender – not the particular email, which is the focus of the "primary purpose" test under the CAN-SPAM Act. Moreover, use of these kinds of tests may touch on questions of what is permitted speech and first amendment concerns which may go beyond the scope of the FTC's legislated authority to promulgate these regulations.[2]

[2] This issue was raised in questioning to FTC Consumer Protection Bureau Director, J. Howard Beales, III, during the hearing on "Unsolicited Commercial Email" before the Subcommittee on Commerce, Trade and Consumer Protection and the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce on July 9, 2003. As Director Beales pointed out, the sending of a news alert or article (or we might add, even a full length periodical) – along with advertising that pays for the service – is not meant to be included in the definition of "primary purpose." We share the Director's concerns, and urge the FTC to avoid this result. See printed transcript at p. 69. (Transcript available at: http://energycommerce.house.gov/108/action/108-35.pdf.)

For similar reasons, the identity of an email's sender is not relevant to whether or not the primary purpose of the email is a commercial advertisement or promotion. Our members are commercial entities which send out valuable and often critical, non-marketing related communications to customers and the public at large; e.g., service notices that inform about developments that may negatively impact use of a product or service. Many of these critical notices are ones that customers are not allowed to opt out of receiving because they need to be aware of the potential negative impact on their personal or business operations and finances.

In suggesting as an initial proposal the use of a "net impression" standard, SIIA looks forward to reviewing the particulars of the FTC's subsequent notice of proposed rulemaking, and especially the identification of issues that may emerge in reviewing the application of existing policy and practice to the purpose and implementation of the CAN-SPAM Act. The use of illustrative examples by the FTC in this regard could be useful, and we look forward to reviewing and commenting as necessary on such examples in the next stage of this proceeding.

Discretionary Rulemaking:

Our comments on some of the ANPR's subjects of discretionary rulemaking under the CAN-SPAM Act follow.

Transactional or Relationship Messages. On the whole, SIIA does not propose major modification to the CAN-SPAM Act's definition of "transactional or relationship message." Based on the short period in which the Act has been implemented, the five broad categories have been generally accepted, although questions have emerged from companies desiring to meet the demands of the Act. We present a few such collateral issues below for clarification, or possible addition to the definitions.

Based on our experience in the actual implementation of the Act, none of the current categories should be excluded from coverage as "transactional or relationship messages" due to changes in technology or practices.

The FTC asked an important question, both in the ANPR and on the website where responses to its request are submitted,[3] about whether the inclusion of an advertisement or promotion should make a "transactional or relationship" message "commercial" and thus subject to most of the Act's substantive requirements and prohibitions. We strongly believe that the purpose and requirement of the Act, and the role and operation of "transactional messages" in the customer relationship, require no further analysis once it is established that an email is a "transactional or relationship message." A determination of an email as a "transactional or relationship message" should be based on the criteria specifically established for this purpose in the Act, and not on any other test, particularly the "primary purpose" test. Otherwise, there

[3] www.regulations.gov.

would be great confusion on the part of both recipients and senders, onerous micromanaging of legitimate email communications, and detrimental effect to the Act's respect for the important customer communications embodied in the Act's categories. In all likelihood, the use of advertising or promotions in these kinds of messages will be incidental or secondary, with any potential risk of abuse very unlikely. In short, even if a transactional or relationship message also advertises or promotes a commercial product or service, it should remain as such and no further analysis should be required as to whether it should be deemed a "commercial" message.

SIIA puts forward four areas where the FTC should either clarify or, if necessary add, categories of "transactional or relationship" messages.

1. While our members believe that email messages that provide critical customer information that is, for example, legally required or otherwise prevents adverse effects on uninformed customers may fit into existing categories, we urge the FTC to make certain that these are not excluded from the definition.[4] Our members may have critical service notices, such as changes in privacy practices, or other legal notices that may not fit neatly into one of the existing categories. The inclusion of these fundamental types of communication to both consumer and business customers as "transactional or relationship" messages, if not already covered, would be consistent with the Act, and would not create loopholes to its enforcement.

2. Single email messages sent on an individual basis. In our industry, a significant number of relationships with potential customers are developed in face-to-face interactions that may directly affect product development, marketing and sales. In these situations, our member companies' representatives may send follow-up email to a potential or current customer and the email may contain information that includes a variety of content, including product or service promotion. If the Act requires that such one-to-one emails require compliance with the CAN-SPAM Act, this will prove impractical, difficult to enforce, and negatively impact customary business practices for maintaining contact with prospective and current customers. This is especially true for our member companies, where sales and product development arrangements are driven through relationships (versus mass-produced, bulk email marketing campaigns). As with the first item immediately above, the inclusion of these types of communication with both consumer and business customers as "transactional or relationship" messages, if not already covered, would be consistent with the Act, and would not create loopholes to its enforcement.

3. Email messages regarding training, even if not specifically provided for by agreement with a customer. In our industry, the training of users (in both consumer and business contexts) is dynamic and faced-paced, with training opportunities changing frequently as new implementations of current and future products reach the market.

[4] CAN-SPAM Act, Section 3(17)(A).

These training services are essential to effective and full use of our industry's products and services, and may not have been in existence at the time the products were originally purchased or licensed. The inclusion of these important types of communication with both consumer and business customers as "transactional or relationship" messages, if not already covered, would be consistent with the Act and would not create loopholes to its enforcement.

4. Email messages regarding subscription or license renewals. A number of our member companies provide notice of their customers' subscription or license renewals via email. Questions have been raised as to whether these emails become "electronic commercial emails" due to the inclusion of information on how the customer can renew his/her account so as to maintain an on-going relationship. In fact, a subscription or license renewal actually provides information to the customers about their current accounts, which is currently provided for under the Act.[5] The inclusion of these types of communication with both consumer and business customers as "transactional or relationship" messages, if not already covered, would be consistent with the Act, and would not create loopholes to its enforcement.

10-business-day time period for processing opt-out requests. Based on our industry's experience, the end-to-end timeframe for accurately and effectively completing opt-out requests exceeds the current 10-business-day time period prescribed in the Act. Even with years of experience in this area, and use of high-quality information technology, our industry finds that this time frame is inadequate to account for a process that includes generating the recipient list (often in batches), preparing and running the suppression (opt out) file against customer list or lists, comparing against customers who have previously opted out, delivering the list to service provider(s), conducting quality assurance testing, and finally updating the customer lists. Our members, even our smaller and medium sized companies, process thousands of such transactions a day. As a result, preparation of suppression files for data extraction and updating and cleansing duplicative records can take significant amounts of time. The 10-business-day time frame also does not recognize the fact that our member companies work with multiple service providers.

SIIA urges the FTC to modify Section 5(a)(4) to provide that senders have no more than thirty-one (31) days after receiving a recipient's opt-out request to process it and put it into effect. This modification not only achieves the purposes of subsection 5(a), it goes far toward minimizing the costs and operational burdens imposed on senders of lawful commercial electronic mail. It assures that the interests of the commercial email recipients are carefully, accurately and reliably implemented. We note that this time frame is consistent with recent

[5] Section 3(17)(A)(iii).

changes implemented by the FTC, as mandated by Congress, for processing updates to the "Do Not Call Registry" under the Final Amended Telemarketing Sales Rule.[6]

Additional aggravated violations. SIIA does not offer any comments on this issue at this time, but will review any proposal put forward by the FTC at the next stage of the rulemaking process.

Implementation of the provisions of the CAN-SPAM Act generally. The FTC has identified several issues that are important to members of SIIA. Our comments follow.

1. Our industry has a great deal of experience in and benefits from joint marketing efforts involving a variety of development partners, distributors, and channels. As the FTC correctly points out, the definition of "sender" contemplates that more than one person can be a "sender" of commercial email because an email can include promotions or advertising from a multitude of companies. By imposing on all the companies the obligations of the "sender," the costs of compliance of these joint marketing efforts – which are legitimate and useful tools to companies and provide real product and service information to customers (both consumer and businesses) – are escalating and make otherwise normal course-of-business dealings unnecessarily complex without any demonstrable benefit to recipients (especially consumers). Some examples follow.

   If a joint marketing email must include an opt out mechanism for all senders, it could require that suppression files be transmitted and shared among many companies. Many of our member companies include in their privacy policies statements that they do not share personally identifiable information with outside companies for promotional use. Transferring suppression files could run afoul of such privacy assurances, perhaps necessitating revision to company policies, and certainly weakening the protections made to customers. Furthermore, requiring all companies with advertising or promotions to be "senders" under the Act and thus share and transfer customer files to meet the standards increases the opportunity for inappropriate use and/or the customer data "falling into the wrong hands." Because our companies often include security safeguards in their policies (either voluntarily or as required under the Gramm-Leach-Bliley Act), companies run the risk of violating their statements, or having to water down the assurances provided in their privacy promises to customers.

   In addition, many joint marketing efforts are executed through agreements that allow one partner to construct and implement email campaigns without the knowledge or

[6] See 16 CFR 310.4(b)(3)(iv), as amended, which goes into effect Jan. 1, 2005. See http://www.ftc.gov/os/2004/03/trs31dayfrn.pdf.

control by the company whose product or service is being incorporated. For example, a brick-and-mortar retailer may send out email communications selling a variety of software or information products to the retailer's own customer base. In those cases, the retailer may not (and often does not) inform the product or service company about the marketing campaign (either because the product is often one that can be bought "off the shelf" at the retailer's stores or the underlying marketing agreement leaves the details open-ended).

A similar, but unique situation exists in the marketing programs of enterprise-level redistributors, which may bundle a variety of products or services (many of which may be related and necessary to successful end user implementation) from different vendors into marketing campaigns without the knowledge or control of the companies that developed the products or services. Because a redistributor acts independently of the vendor companies, the latter have no way of knowing or controlling the timing or specifics of the email communication because the relationship is between the redistributors and the customer. The management of opt out requests in these situations is not merely overwhelming, it raises similar issues regarding the privacy and security policies identified above.

We, therefore, urge the FTC to recognize the importance of these joint marketing and redistribution efforts and ensure that the definition of "sender" does not impose costly operational burdens on companies nor force them to act either in conflict with their privacy policies or water them down so as to meet the requirements of the CAN-SPAM Act. As a preliminary matter, the FTC might consider a definition of "sender" that is tied to the directing and controlling of the development and implementation of the email marketing campaign taking into account the role played in defining final email communication copy, determining the recipients of the campaign and ultimately the primary relationship with the targeted recipients.

2. In the view of SIIA, "forward-to-a-friend" and similar marketing campaigns that rely on customers to refer or forward commercial emails to someone else do not fall within the parameters of "inducing" a person to initiate a message on behalf of someone else. It is important that the FTC understand that there is no "one size fits all" way in which these legitimate and useful initiatives operate.

   For many companies, "forward-to-a-friend" programs (available through websites or in emails) merely facilitate the easy transfer of information about a product or service from a customer to someone else (i.e. their friend or colleague). A customer could accomplish the same goal by cutting and pasting the information into their own email and sending it to their friend. A "forward-to-a-friend" mechanism merely facilitates this process by saving the customer time and additional steps in accomplishing the

same outcome (that is, getting information that the customer deems beneficial to the friend.)

In these kinds of cases, the friend's email address is used solely to forward the message and is not retained by the intermediary company. It, therefore, cannot be used to send future marketing to the recipient-friend, and as such there is a lack of justification to come under the scope and requirements of the Act. It would be difficult, if not impossible for the intermediary company to check against any "opt outs" that it has on file or otherwise satisfy the requirements of the Act.

In some "forward-to-a-friend" situations, the friend's email address is retained for future marketing use. However, in the event the email is subsequently used to send a commercial email, the requirements of the Act would come into operation either through the process of running suppression lists of "opt outs" or, where no opt out is evident, after receipt of the initial "tell-a-friend" email by the recipient. In the latter situation, the follow-on email from the "forward-to-a-friend" program would contain a notice of future use of the recipient's email address and an opt out mechanism. If the friend subsequently opts out, the email address would then be suppressed from receiving any future marketing communication from the company whose product is being promoted or advertised.

This view is both consistent with the requirements of the Act and does not result in a detrimental effect on recipients (who may be either consumers or businesses). "Forward-to-a-friend" emails are sent on an individual basis and are not the subject of bulk email campaign. Any further treatment of these kinds of communications puts the FTC into the precarious situation of overregulating individual emails between friends or colleagues with an established relationship.

3. In the view of SIIA, a valid physical postal address of the sender that is required to be disclosed in each commercial electronic mail message should allow for use of a post office box. Nothing in the Act suggests that it did not intend to include such addresses, and post office boxes have been used by legitimate companies for decades. We note that the focus of the Act was to ensure an accurate physical postal address (and not rely on email addresses) and clearly the post office box provided as required in the email must be accurate. An individual or entity seeking to evade identification can just as easily use inaccurate street addresses, or just as easily hide behind either a valid post office box or street address. There is no rationale for precluding their use.

4. The FTC has asked whether the Act is sufficiently clear as to what information may or may not be disclosed in the "from" line. SIIA recognizes the importance of this provision and believes that it is an essential element to enforce against misleading and deceptive emails. SIIA also urges caution here, as the test should be whether the

"from" is misleading in the context of inducing the recipient to open unwanted or misleading email communications – or is used to hide the identity of the sender. The fact that the email does not, on its face, identify the sender by name may not be determinative. For example, many legitimate companies are known by their *brands*. The fact that the email comes from the company (which the recipient may not recognize) that produces the well-known product or service – or conversely, the email includes the name of the brand and not the company – is not at issue in the implementation of the Act. Our previous discussion of joint marketing efforts is also relevant here. The fact that the email may identify one of the marketing partners, and not all of them, is also not detrimental the purposes of implementing the Act. SIIA looks forward to reviewing any proposal the FTC decides to put forward in this area.

General Comment on www.regulations.gov

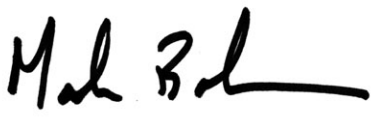
SIIA notes with interest the new portal for submitting comments to the FTC, www.regulations.gov. We appreciate the efforts of the FTC in utilizing web-based tools that assist the agency in managing the tremendous number of transactions and submissions that it receives.

We are concerned, however, that for this proceeding, a "poll" has been placed on the portal with preconceived answers to some of the questions that the FTC put forward in a more comprehensive form in this ANPR. At minimum, the FTC needs to clearly state that submitting comments is not dependent on completing the multiple-choice poll. Moreover, the results of the poll cannot be a substitute for the FTC obligations to review all comments and provide analysis for its proposals.

Conclusion

We appreciate this opportunity to respond to many of the questions put forward by the FTC in its ANPR. We look forward to reviewing the proposed rule and participating at the next stage of this proceeding. Please do not hesitate to contact me if you have any questions.

Sincerely,



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